

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ABBY WILMOTH,

Case No. 18-cv-2504 (NEB/DTS)

Petitioner,

v.

ORDER ON REPORT AND
RECOMMENDATION

WARDEN NANETTE BARNES,

Respondent.

This is a habeas action brought under 28 U.S.C. § 2241 by petitioner Abby Wilmoth (“Wilmoth”). [ECF No. 1.] In a Report and Recommendation (“R&R”) dated October 29, 2018, United States Magistrate Judge David T. Schultz recommended that the matter be dismissed without prejudice for lack of jurisdiction, in part because Wilmoth has never sought relief from her sentence under 28 U.S.C. § 2255. [ECF No. 5 at 4–5.] Wilmoth filed a response to the R&R in which she raises no objections; rather, she attaches a motion for relief under 28 U.S.C. § 2255 and asks the Court to transfer the motion to the appropriate court. [ECF No. 6 at 2; ECF No. 7.] Because no party has objected to the R&R, the Court reviews it for clear error. *See* Fed. R. Civ. P. 72(b); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). The Court finds no clear error, and thus, accepts the R&R and dismisses this matter without prejudice for lack of jurisdiction.

Turning to Wilmoth's recently filed § 2255 motion, nothing prevents Wilmoth from filing a § 2255 motion because she has never before sought relief under § 2255. *See* 28 U.S.C. § 2255. Wilmoth recognizes that this Court is not the correct venue for her § 2255 motion, and requests that the Court transfer her motion to the appropriate venue, which is the United States District Court for the Western District of North Carolina. [ECF No. 6 at 2.] Because Wilmoth is able to file a § 2255 motion and has provided the Court with such motion, the Court will forward the motion to the Western District of North Carolina for filing. *See* Rules Governing § 2255 Proceedings, Rule 3(b) ("The clerk must file the [§ 2255] motion and enter it on the criminal docket of the case in which the challenged judgment was entered."). The Court warns Wilmoth that any subsequent motion she may file challenging her sentence under § 2255 will likely be deemed "second or successive." 28 U.S.C. § 2255(h). If Wilmoth wishes to avoid this consequence, she should inform the Western District of North Carolina court immediately that she does not intend to prosecute her § 2255 motion, notwithstanding what she has told this Court in her response to the R&R.

Based upon all the files, records, and proceedings in the above-captioned matter, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation [ECF No. 5] is ACCEPTED;
2. The matter is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction; and

3. The Clerk is DIRECTED to FORWARD Wilmoth's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [ECF No. 7], along with a copy of this Order, to the United States District Court for the Western District of North Carolina for filing there.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 8, 2019

BY THE COURT:

s/Nancy E. Brasel
Nancy E. Brasel
United States District Judge